86-2066

No. A-817

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MINORU YASUI and TRUE S. YASUI,
Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEGGY A. NAGAE
Betts, Patterson
& Mines, P.S.
800 Financial Center
1215 Fourth Avenue
Seattle,
Washington 98161-1090
(206) 292-9988
Counsel of Record

CLAYTON C. PATRICK
P.O. Box 344
Salem, Oregon 97308
(503) 581-9292

June 21, 1987

Additional counsel on inside front cover.

---

108 pp

Additional counsel:

DON S. WILLNER
Willner & Kelly
Suite 303
111 S.W. Front Ave.
Portland, Oregon 97204
(503) 220-0328

FRANK CHUMAN
5306 Angeles Crest Hwy.
La Canada/Flintridge,
California 91011
(818) 952-9019

WM. SCOTT MEISNER
127 North Lawrence
Eugene, Oregon 97401
(503) 344-4465

BERT K. FUKUMOTO
Suite 800
520 S.W. Yamhill
Portland, Oregon 97204
(503) 226-6151

STEPHEN L. GRIFFITH
Suite 2300
900 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 294-9203

Counsel for Petitioner
and True S. Yasui

QUESTIONS PRESENTED

1. Whether the urgent and overriding national importance of the issues in this case required the Ninth Circuit Court of Appeals to allow Minoru Yasui's Petition for Writ of Error Coram Nobis to be fully resolved on its merits, notwithstanding Petitioner's untimely death.

2. Whether the Ninth Circuit Court of Appeals erred in granting the Government's Motion to Dismiss as moot the appeals pending on Minoru Yasui's Petition for Writ of Error Coram Nobis.

3. Whether the Ninth Circuit Court of Appeals erred in denying Mrs. True S. Yasui's Motion for Substitution of Party allowing her, as widow and personal representative of Petitioner Minoru Yasui, to be substituted for him, so that the appeals would be finalized and the Petition for Writ of Error Coram Nobis

fully resolved on its merits.

LIST OF PARTIES

1. Mr. Minoru Yasui, deceased, Petitioner for Writ of Error Coram Nobis;

2. Mrs. True S. Yasui, widow and personal representative for the estate of Minoru Yasui;

3. United States of America, Respondent on Petition for Writ of Error Coram Nobis.

TABLE OF CONTENTS AND AUTHORITIES

Statutes & Rules Cited

Cases Cited

Other Authorities

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MINORU YASUI and TRUE S. YASUI,
Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners Minoru Yasui and True S. Yasui respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on March 23, 1987.

OPINIONS BELOW

The only reported decision in this case was the earlier opinion of the Ninth

Circuit Court of Appeals granting limited remand for filing a motion requesting additional time to file notice of appeal. *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985). That opinion does not discuss any matters at issue in this Petition for Writ of Certiorari, and is reprinted in the Appendix hereto, at App-18.

The judgment which this Petition for Writ of Certiorari seeks to reverse was entered by the Ninth Circuit Court of Appeals on March 23, 1987, and was not reported. It is reprinted in the Appendix hereto, at App-40.

JURISDICTION

The judgment sought to be reviewed was entered March 23, 1987. No motion for rehearing or reconsideration was filed. Petitioner moved for, and was granted a thirty day extension of time to file the Petition for Writ of Certiorari. Juris-

diction for this Petition for Writ of Certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes, rules and orders involved in this appeal are reproduced in the Appendix at the pages noted.

STATEMENT OF THE CASE

In March 1942, Petitioner Minoru Yasui, an Oregon attorney and American of Japanese ancestry, faced a dilemma: General DeWitt of the Western Defense

Command had imposed, pursuant to Executive Order 9066, a curfew on all persons of Japanese ancestry. Mr. Yasui believed the order to be unconstitutional and intentionally chose to test the entire internment program by seeking his own arrest, surrendering his liberty, and litigating the constitutionality of the wartime program. Yasui intentionally placed his trust in the courts, believing that the justice denied him by the executive and legislative branches would be restored by the judiciary.

Just as intentionally, and unknown to Mr. Yasui or this Court, the military officials and government prosecutors proceeded on a course of misconduct and fraud only quite recently uncovered. Mr. Yasui was convicted by the District Court of Oregon of violating the militarily-imposed curfew order in 1942. The Ninth

Circuit, declining to rule in the matter, certified the appeal to this Court.

This Court affirmed the Petitioner's conviction, based on the evidence made available at the time by the Justice and War Departments. Rejecting Petitioner's challenge to the military order, the *Yasui* Court held that racially discriminatory measures may be sustained when justified by expressions of military necessity, and in so holding condoned one of the most sweeping deprivations of civil liberties in modern times. *Yasui v. United States,* 320 U.S. 115 (1943), App-10. *See also Korematsu v. United States,* 323 U.S. 214 (1944) and *Hirabayashi v. United States,* 320 U.S. 80 (1943).

Recently discovered evidence, however, has shown that during its prosecution of Petitioner and other Japanese Americans, the government

deliberately altered, destroyed and suppressed material evidence proving that the curfew and internment were factually insupportable, and thus obtained this Court's favorable rulings by a course of intentional misconduct. The odious precedents created by that fraud upon the courts stand yet today.

On February 1, 1983, Petitioner filed a Petition for Writ of Error Coram Nobis, seeking redress not only for himself but also for the thousands of citizens whose rights were grossly violated by this Court's confirmation of the curfew and internment orders. The Petition demonstrated that the War and Justice Departments intentionally manipulated and withheld evidence before this Court to create the **appearance** of a military threat from all Japanese Americans. In order to justify to this Court the wrongful incar-

ceration of some 110,000 Japanese Americans, including Petitioner, the War Department forced General DeWitt to alter his *Final Report* to conceal his racist view that people of Japanese ancestry were inherently disloyal, and that one could not tell the "sheep from the goats."[1]

---

[1] The initial version of General DeWitt's *Final Report* is significant because it demonstrated that the decision to intern Japanese Americans was based on racial and cultural prejudice, rather than military considerations. In particular, the Report concluded:

> It was impossible to establish the identity of the loyal and the disloyal [Japanese Americans] with any degree of safety. It was not that there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the "sheep from the goats" was unfeasible.

Final Report, Japanese Evacuation from the West Coast, [initial version, 1942] at 9, quoted in Brief of Amicus Curiae Fred Korematsu, Gordon Hirabayashi and Minoru Yasui, filed with this Court in *United States v. Hohri, et. al.*, No. 86-510, at

The Petition further alleged that government officials intentionally suppressed evidence showing the loyalty of Japanese Americans and the absence of any acts of espionage or sabotage. Specifically, the Petition alleged that government attorneys failed to inform Petitioner or this Court of the racist falsity of General DeWitt's Final Report, of the existence of a report by the Office of Naval Intelligence which concluded that Japanese Americans were **not** a danger to the United States, or of the FBI and FCC investigatory reports which refuted the claims of Japanese-American espionage, sabotage and disloyalty.[2] The Petition

---

45.

[2] *Report on the Japanese Question* by Lt. Commander Kenneth D. Ringle, U.S. Navy, January 26, 1942; Memorandum, J. Edgar Hoover to the Attorney General, February 7, 1944, Folder - Japanese Relocation Cases III, Box 37, Fahy Papers,

also demonstrated that the government intentionally abused the use of judicial notice and improperly manipulated the amicus briefs submitted by the Attorneys General of Oregon, Washington and California. Together and separately these governmental actions constituted a course of misconduct and fraud upon this Court.

Only since late 1981 has proof been available from the National Archives that the evidence was falsified, that exculpatory evidence had been destroyed or suppressed, and that the Justice and War Departments had committed an intentional fraud upon the courts. The evidence withheld both from the trial court and this Court did not simply contradict, but

---

Franklin D. Roosevelt Library, Hyde Park, N.Y.; Letter from FCC Chairman James L. Fly to Attorney General Francis Biddle, April 4, 1944. *See generally Brief of Amicus Curiae, United States v. Hohri, supra* n.1, at 37-42.

in fact refuted "evidence" offered by the government in support of the constitutionality of the wartime internment program.

The government moved for the Petition's summary dismissal without any inquiry into its allegations of governmental misconduct, apparently on the basis of Federal Rule of Criminal Procedure 48(a). Over Petitioner's strenuous opposition, the district court issued an order granting the government's motion and dismissing the Petition, on January 26, 1984. *Yasui v. United States,* D.Or. No. 83-151 RCB; App-15.

Petitioner appealed the dismissal to the Ninth Circuit, Case No. 84-3730, contending that the court had no authority to dismiss the Petition without an evidentiary hearing. The merits of that appeal were briefed and argued, but not decided. Instead, the Ninth Circuit found

the appeal untimely filed, holding that the 10 day limit in criminal cases applied to coram nobis, rather than the 60 day civil limit. It therefore remanded the proceeding to the district court for consideration of a motion to extend time for appeal under Federal Rule of Appellate Procedure 4(b). *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985), App-18.

On May 5, 1986, the district court granted Petitioner's motion for an extension of time to file the appeal. App-37, App-39. The government then appealed that court's discretionary finding of excusable neglect to the Ninth Circuit, Case No. 86-3116. That appeal was also briefed, but not argued or decided.

Sadly, Petitioner succumbed to cancer on November 12, 1986, at the age of 70. At the time of his death, he was awaiting the Ninth Circuit's decisions on both his

appeal of the district court's dismissal of his Petition for Writ of Error Coram Nobis, and the government's appeal of the district court's granting of additional time to file the notice of appeal. Shortly after Petitioner's death, the government moved the Ninth Circuit to dismiss both of the pending appeals as moot. Petitioner's counsel and his widow and personal representative, Mrs. True S. Yasui, opposed the government's motion, and Mrs. Yasui moved to be substituted as party of record in place of her late husband.

On March 23, 1987, without oral argument, a motions panel of the Ninth Circuit (**not** the merits panel which had heard all other aspects of the case) issued a three-line order dismissing without explanation Mrs. True S. Yasui's Motion for Substitution, and granting

without explanation the government's motion to dismiss. App-40.

Jurisdiction for the Petition for Writ of Error Coram Nobis was conferred on the federal courts by the All-Writs Act, 28 U.S.C. § 1651. This section provides district courts with the authority to issue writs of error coram nobis to vacate the criminal convictions of post-custodial defendants. *United States v. Morgan,* 346 U.S. 502 (1954). Jurisdiction for appellate review at the Ninth Circuit was based on 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I.

Introduction.

This extraordinary case should be continued: the controversy is alive and justiciable. The government's motion to dismiss the appeals as moot should have been denied, and the case should have been

allowed to continue to full and complete resolution because the enormity of the issues involved transcends Petitioner's individual case. Mrs. True S. Yasui's motion for substitution of party should have been granted to allow her to represent the interests of her husband, Minoru Yasui.

This case presents issues of monumental importance to all Americans, and to the integrity of the American judiciary. Again, Petitioner's conviction was obtained and affirmed only through an extraordinary course of pervasive governmental misconduct amounting to a fraud upon the courts and resulting in a profound corruption of the judicial process. That misconduct not only injured the Petitioner, but inflicted immeasurable suffering on over 110,000 other Americans of Japanese ancestry. This coram nobis

petition raises fundamental questions of the ethical and legal obligations of governmental officials. Justice demands that these serious questions be resolved, and it is most fitting that redress be granted by the **same** Court that was prevented from working justice forty years ago.

Moreover, the public interest demands that this great wrong be righted. To serve the public interest, this Court should neither allow this case to be summarily dismissed, nor allow the government to sweep the entire episode under the rug of history. Instead, the case should be fully resolved on its merits, to deter the government from future misconduct, and to prevent continuing racial discrimination based upon this Court's 1943 decision.

Further, the government must **not** be

allowed to evade judicial scrutiny by first hindering access to full and fair judicial review through its wrongful actions, and then attempting to avail itself of Petitioner's death to get rid of the case -- just as the government persuaded the district court to dismiss the Petition without inquiry into its allegations. To allow the Ninth Circuit's dismissal of the appeals to stand would fix for all time a pattern of misconduct which has denied Petitioner a fair and impartial adjudication of his fundamental constitutional rights. This Court must address and undo the fraud committed upon it and permit the purging of the tainted judicial record.

Even now, Petitioner represents all Japanese Americans who, without charges or trials, were incarcerated during World War II because of suspicions and fears of

treason born of racial prejudice and hatred. His death cannot, with justice, preclude a full hearing on the merits of the governmental misconduct detailed in the underlying Petition. Only when such inquiry is allowed will the injustice inflicted on Petitioner, on all Japanese Americans, indeed on all Americans and the Constitution itself, be remedied. It was Petitioner's dying wish that his case continue in order to obtain the redress he believed possible not only for himself and his own reputation, but for all citizens who live under the cloud of treason formed by the 1943 precedents.

II.

In a coram nobis proceeding, death of the Petitioner does not render the case moot, because of continuing collateral consequences of the invalid conviction.

As this Court made clear in *United States v. Morgan,* 346 U.S. 502 (1954), a

remedy in the nature of the ancient common law writ of error coram nobis is available in federal courts to correct manifest injustice where the defendant has completed serving his sentence. The purpose of coram nobis today is to ensure that justice can be done even in circumstances where the controversy is apparently at an end. The very nature of the proceeding counsels against its perfunctory dismissal, regardless of a petitioner's death.

Thus, the mere fact that the instant proceeding was brought forty years after conviction and direct appeal does not render the proceeding moot or preclude relief by writ of error coram nobis. Likewise, because of the fundamental importance of the issues now before this court, Petitioner's untimely death does not render this case moot, because a petitioner's death does not automatically

moot an appeal. 13A C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3533.4, p. 312 (2d ed. 1984): "There is no inevitable reason why the appeal must always be found moot."

To support its motion to dismiss the appeals, the government cited only two cases, neither of which involved a coram nobis proceeding, and neither of which supported its position.[3] Thus, citing the Ninth Circuit's decision in *United States*

---

[3] As a threshold issue, the government's motion for an order dismissing the appeals as moot should have been denied on elementary procedural grounds. It was the government's burden, as the moving party, to show mootness. *See Sibron v. New York,* 392 U.S. 40, 57-58 (1968); *Scarborough v. Kellum,* 525 F.2d 931, 932 n.2 (5th Cir. 1976). The government, however, made no attempt to prove mootness. The government's motion said no more than that Petitioner had died. Thus, the government utterly failed to carry the burden on its own motion, and the motion should have been denied on that ground alone.

v. Oberlin, 718 F.2d 894 (9th Cir. 1983), the government asserted that the death of a petitioner moots a collateral attack on a conviction. *Oberlin*, however, was not a collateral proceeding, let alone a coram nobis case, but rather a **direct** appeal from the **original** criminal conviction.

In *Oberlin*, the Ninth Circuit held that since the defendant's death deprived him of his right to a direct appeal as an integral part of the original proceeding, his judgment of conviction would be vacated, and the indictment dismissed. That result was based on the fact that until the **direct** appeal is completed, a conviction is not finalized. *Id.* at 896. Once a conviction has been finalized by the completion of the direct appeal process, as in Petitioner's case, the simplistic remedy used in *Oberlin* is no longer available.

Yet more irrelevant was the government's reliance on *Schreiber v. Sharpless*, 110 U.S. 76 (1884). *Schreiber* was not even a criminal proceeding, but rather a private action seeking statutory penalties for copyright violation. Indeed, *Schreiber* **supports** the continuance of Petitioner's action in the interest of justice because this Court made it clear that "[w]hether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it." *Id.* at 80.

Thus, whether a particular proceeding should be dismissed is not amenable to mechanical application of a simple procedural rule, but turns on the **substance** of the claim and requires an inquiry into **all** the circumstances of the case. Usually, this inquiry is easily made and would not change the general

result flowing from a litigant's death. However, the required inquiry in this extraordinary case -- into the nature and showing of manifest injustice in earlier proceedings, including the hearing before this Court, the continued consequences of that injustice on Petitioner and others, and the importance of these issues to society and our system of justice--compels the conclusion that court review of the charges raised by Petitioner must continue.

Contrary to the government's characterization, this case is **not** a prosecution and has not been one since 1943, when this Court, on the basis of deliberately falsified evidence, affirmed Petitioner's conviction for refusing to obey military orders which profoundly violated our most basic constitutional principles. Far from a prosecution, this coram nobis petition

is, in substance, an independent proceeding to vacate Petitioner's wartime conviction on the specific ground that it was unconstitutionally obtained, through governmental misconduct and fraud upon the courts. Petitioner's original conviction and direct appeal, as well as the processes of our system of justice, were tainted by that unconstitutional misconduct and the issue of that misconduct survives today.

By its very nature, the writ of error coram nobis is intended to redress cases of manifest injustice. It would be difficult to imagine a more egregious injustice than that which Petitioner seeks to redress in this action. Given the legal and historical impact of Petitioner's case in the 1940's, this action would redress an injustice not only for him, but also for those other 110,000

Japanese Americans who were imprisoned with him in this nation's first concentration camps.

The writ of error coram nobis is not a statutory writ, although it is generally based upon the All Writs Act, 28 U.S.C. § 1651. Except by analogy to the great writ of habeas corpus which has protected the people against the unlawful abuse of government power, no rules explicitly govern its procedures or, in particular, its survival upon the death of a petitioner. In substance, however, the instant proceeding is not a prosecution, but is more closely analogous to a civil rights action for the redress of the deprivation of fundamental constitutional freedoms, and should be governed by the principles applicable to such proceedings.

The federal civil rights laws also do not directly address the issue of survival

of actions, but rather require that the federal courts shall be governed by "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988. Thus the federal courts are required to adopt, as federal law, the survival statute of the forum state. *Robertson v. Wegmann,* 436 U.S. 584, 591-92 (1978). Federal courts look to the forum state's survival statute "since the provisions of section 1983 do not effectuate the broad remedial purpose of that Act by specifically providing for survival of actions." *Hall v. Wooten,* 506 F.2d 564, 569 (6th Cir. 1974).

Rejecting the assertion that only the "party injured" may invoke the protections

of 42 U.S.C. § 1983, the Fifth Circuit has written that

> . . . it defies history to conclude that Congress purposely meant to **assure to the living** freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes **against the peril of death**. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions.

Brazier v. Cherry, 293 F.2d 401, 404 (5th Cir. 1961), *cert. denied*, 368 U.S. 921 (1961) (emphasis added). In *Brazier*, the Court of Appeals held that an action by a widow against Georgia police officers for the death of her husband as the alleged result of violations of the Civil Rights Statutes survived by virtue of Georgia's survival statute. The court ruled that "the state law is to be used to the extent that it is currently available to overcome

these deficiencies [in the provisions necessary to furnish suitable remedies and punish offenses against the civil rights law and policy]." 293 F.2d at 408.

It is only through the application of state survival statutes that the broad remedial purposes of the Civil Rights Statutes can be accomplished. Those survival statutes reverse the harsh common law rule that an injured party's claim was extinguished upon the death of either the injured party or the alleged wrongdoer. *See Moor v. County of Alameda,* 411 U.S. 693, 702 n.14 (1973). *See also Barrett v. United States,* 689 F.2d 324 (2d Cir. 1982), *cert. denied sub. nom. Cattell v. Barrett,* 462 U.S. 1131 (1983); *White v. Walsh,* 649 F.2d 560 (8th Cir. 1981); *Davis v. Oregon State University,* 591 F.2d 493 (9th Cir. 1978); and *Duchesne v. Sugarman,* 566 F.2d 817 (2d Cir. 1977).

The area of civil rights is by no means the only area of law in which federally created causes of action have been held to survive where the creating statute made no express provision as to survival. In ruling that a statutory cause of action by the personal representative of a seaman whose death was caused by a maritime tort did not abate on the death of the sole beneficiary, Justice Cardozo wrote as follows:

> Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and **unity with a legislative policy which is itself a source of law**, a new generative impulse transmitted to the legal system.

Van Beeck v. Sabine Towing Co., 300 U.S.

342, 350-51 (1937) (emphasis added). *See also Dellaripa v. New York, New Haven & Hartford R. Co.*, 257 F.2d 733, 735 (2d Cir. 1958) (F.E.L.A. cause of action survived death of sole beneficiary); *Union Carbide Corp. v. Goett*, 256 F.2d 449, 453 (4th Cir. 1958) (maritime law, state survival statute applied); *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306, 311 (8th Cir. 1957) (admiralty case, Missouri wrongful death statute applied); and *Rogers v. Douglas Tobacco Board of Trade*, 244 F.2d 471, 483 (5th Cir. 1957) (Sherman Act cause of action survived both by reason of the remedial federal policy of that statute and the Georgia survival statute).[4]

---

[4] Congress' policy became apparent in 1980 when it established the Commission on Wartime Relocation and Internment of Civilians, to "review the facts and circumstances surrounding Executive Order Numbered 9066, issued February 19th, 1942,

Under the federal civil rights laws, then, the federal court would, and in this case **should** look to Oregon's survival statute to determine whether an action to challenge the deprivation of federal civil

---

and the impact of such Executive order on American citizens and permanent resident aliens" and to "review directives of United States military forces requiring the relocation and, in some cases, detention in internment camps of American citizens" including those of Japanese ancestry. Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, § 2, 94 Stat. 964 (1980).

The Commission's membership included present and former members of Congress, the Supreme Court, and the Cabinet as well as distinguished private citizens. The Commission held some twenty days of hearings around the country, heard testimony from more than 750 witnesses, including government decision-makers involved in the issuance of the Executive Order and its implementing military orders, and made an extensive review of government records and other sources of information.

The factual findings and conclusions of the Commission are set forth in *Personal Justice Denied,* submitted to Congress in February 1983, as supplemented by the Addendum and Additional Views to the Commission's Report, submitted to Congress in June 1983.

rights would survive the party's death. Oregon law provides:

> Causes of action arising out of injuries to a person, caused by the wrongful act or omission of another, **shall not abate upon the death of the injured person**, and the personal representatives of the decedent may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for an injury done by the same act or omission.

Or. Rev. Stat. § 30.075(1) (1987) (emphasis added). Thus, following Oregon law, a section 1983 action would survive complainant's death. Likewise, Petitioner's coram nobis proceeding should survive his death.

Construing a similar survival statute, the federal district court in New Jersey concluded that actions in defamation survive the plaintiff's death. The court allowed the deceased plaintiff's executor to maintain the action, under a

state statute allowing such substitution and continuation of tort actions. *MacDonald v. Time,* 554 F. Supp. 1053 (D. N.J. 1983). Similarly, it has been held that a libel and slander action survives the victim's death under a remedial survival statute, because vindication and restoration of the victim's reputation are the most important functions of the cause of action. *Moyer v. Phillips,* 341 A.2d 441, 444 (N.J., 1975).

In this case, the vindication and restoration of Petitioner's reputation are important interests not only for his family, which has suffered for over forty years with this outrage, but also for the entire Japanese American community, which has suffered under the burden of the precedent of Petitioner's case. In *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150

(1970), this Court acknowledged that such interests, whether based upon family, spiritual, or financial considerations, do demand judicial recognition:

> A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here. Certainly he who is "likely to be financially" injured may be a reliable private attorney general to litigate the issues of the public interest in the present case.

397 U.S. at 154 (citations omitted).

The circumstances of Petitioner's case are far more compelling. Petitioner and the entire Japanese American community were deliberately and wrongfully deprived of their most fundamental constitutional rights. To allow the Ninth Circuit's

order of dismissal to stand would deny vindication of those rights. Only through continuation of this proceeding to final resolution, through the efforts of Petitioner's widow and family, can this great wrong be righted. Not only the family's interest, but the interest of the American people, the Constitution and this Court in such vindication demand a decision on the merits of the Petition. Again, in the eloquent words of Justice Cardozo, "[i]t would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied." Van Beeck v. Sabine Towing Co., 300 U.S. at 350-51.

III.

The public interest in deterring future misconduct, correcting tainted court records, and ensuring justice establishes a continuing justiciable controversy.

This Court has long recognized that

it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). The government in this case has sought to usurp the judicial function by attempting to dismiss the Petition summarily. This Court can no more allow this Petition to be dismissed without its own independent review of the entire proceeding, and without allowing the Petition to proceed to its final conclusion, than it could allow an assertion of unbridled executive privilege to stand unreviewed. As Chief Justice Burger has written:

> The impediment that an absolute, unqualified [executive] privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Article III. In designing the structure of our Government and dividing and allocating the

> sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

United States v. Nixon, 418 U.S. 683, 707 (1974).

Throughout this case the government has contended that it has the absolute authority to vacate Petitioner's conviction without confession of error, and to dismiss his Petition without any judicial inquiry into the allegations of governmental misconduct and fraud upon the courts. Even a confession of error does **not** "relieve this Court of the performance of the judicial function." *Young v. United States*, 315 U.S. 257, 258 (1942). To carry out that judicial function, it is and must be

> . . . the uniform practice of this Court to conduct its own examination of the record in all

> cases where the Federal Government or a State confesses that a conviction has been erroneously obtained. For one thing, as we noted in *Young*, "our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties." 315 U.S. at 259, 62 S.Ct. at 511.

Sibron v. New York, 392 U.S. 40, 58 (1968).[5]

Similarly, in the leading case of *Petite v. United States*, 361 U.S. 529 (1960), in which the government moved for leave to dismiss an indictment against the defendant, Chief Justice Warren cautioned

---

[5] That the wartime cases have counted as precedents cannot be disputed. According to Shepard's United States Citations, *Yasui v. United States*, 320 U.S. 115 (1943), has been cited ten times since decision; *Hirabayashi v. United States*, 320 U.S. 81 (1943), has been cited 657 times since decision; and *Korematsu v. United States*, 323 U.S. 214 (1944), has been cited 413 times since decision. *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (citing to the wartime cases in support of the war power even over citizens).

that the Court should not allow a prosecutorial dismissal to thwart the necessary judicial inquiry:

> There are circumstances in which our responsibility of definitively interpreting the law of the land and of supervising its judicial application would dictate that we dispose of a case on its merits. In a situation, for example, **where the invalidity of the judgment is clear and the motion to vacate and remand is obviously a means of avoiding an adjudication, I think we would be remiss in our duty were we to grant the motion.**

361 U.S. at 532 (Warren, C.J., concurring) (emphasis added). *See also United States v. Cowan,* 524 F.2d 504 (5th Cir. 1975).[6]

---

[6] Petitioner has argued extensively below that the district court neglected to conduct the necessary judicial inquiry in this case. Not only did the district court dismiss the Petition without **any** evidentiary hearings with respect to its allegations of grave governmental misconduct, but the district court granted the government's improper Rule 48(a) motion to vacate Petitioner's conviction without consideration of or inquiry into whether granting that motion served the public

The great weight of authority has long recognized that when the public interest is involved, the federal court may retain an appeal for hearing and determination, despite its otherwise being moot. *United States v. Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897); *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498 (1910).

It would be difficult to imagine a case presenting issues more basic to our constitutional system: (1) the government's deliberate suppression and falsification of evidence and fraud upon the courts, including this Court, in a case of national constitutional magnitude and (2) the continuing viability of the precedent set in the 1943 and 1944 cases, which

---

interest. *See* Appellant's Opening Brief at 13-14, 17-24, *Yasui v. United States,* 772 F.2d 1496 (9th Cir. 1985).

condoned blatant governmental racial discrimination against many thousands of American citizens. Both Petitioner and the nation were deprived of a fair resolution of these issues by the government's misconduct. Its protestations notwithstanding, the government's conduct in this case has always made clear that it wants the whole "unfortunate episode" swept under the rug. The public interest **demands** that this episode not be forgotten, and that this case continue to full resolution.

Only now does the public have the opportunity to see this great wrong righted, and a new precedent set which will deter such misconduct by government officials in the future, and clearly state that the rights of American citizens cannot be so ruthlessly denied because of their racial heritage.

And only now does the public have an opportunity to restore and ensure the integrity of the judicial process. In this case judicial integrity was seriously impaired by the misconduct of government officials who knowingly concealed crucial evidence from this Court, as it was deciding constitutional issues of singular importance.

It is this Court, and **only** this Court, which has both the duty and the authority to undo the damage done to the American judicial process in the wartime cases, and to set a new precedent which will make it clear to the nation that such misconduct will never happen again.

IV.

The government's own misconduct, which prevented a fair adjudication of the wartime case, and thus caused the delay in bringing this coram nobis action, bars the finding of mootness.

It is axiomatic that any court may

undertake to "review the question of mootness where it goes to the very existence of a controversy for the court to adjudicate." *Sibron v. New York,* 392 U.S. 40, 51 (1968). The Petition for Writ of Error Coram Nobis charges that in securing this Court's affirmance of Petitioner's conviction, the government engaged in a far-reaching course of unconstitutional misconduct and fraud upon the courts. The Petition is accompanied by over 100 pages of documentary evidence in support of those charges. The government denies any such misconduct, while in the same breath agreeing that the conviction should be vacated. Unless and until the Petition is decided on its merits, Petitioner's life and reputation remain under a cloud of treason, because vacation of his conviction without express findings of governmental misconduct amounts to no more

than a pardon.

This Petition charges that the government deliberately altered and suppressed evidence to present a false record to the courts, in order to secure and preserve Petitioner's conviction for challenging the constitutionality of the military curfew order. The crucial evidence proving that misconduct was concealed and unavailable until after late 1981. Petitioner therefore was unable to bring this action for redress before then.

The doctrine of mootness does not apply when review cannot be accomplished before the expiration of sentence. *Sibron,* 392 U.S. at 51. As the *Sibron* Court stated:

> . . . a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing.

Id. at 53. Likewise, this Court must reject the Ninth Circuit's approval of the government's attempt to dismiss this appeal as moot, when it was the **government's own actions**, both now and in 1942-43, which denied Petitioner a fair trial and kept from him the evidence that his conviction was unconstitutionally obtained.

The controversy -- between Petitioner and the government -- is still alive. It has survived for over four decades, and it now survives this Petitioner's untimely death.

V.

The ancient remedy of coram nobis has traditionally survived a defendant's death, in both civil and criminal cases.

The substantial issues compelling judicial review and inquiry in this case are entirely compatible with both the historical origins and the modern nature

of the coram nobis writ. As discussed above, this Court recognized in *United States v. Morgan,* 346 U.S. 502 (1954), that the ancient writ survives in modern federal practice in order to remedy manifest injustice, just as in medieval England.

Coram nobis was originally a civil procedure. Freedman, *The Writ of Error Coram Nobis,* 3 Temp. L. Q. 365, 372 (1929). When it developed, only issues of law were appealable. Early English law did not include an effective method for correcting factual errors that were not contained in the trial record. 3 W. Blackstone, *Commentaries* § 406; *Freedman, supra; see generally* Comment, *Coram Nobis: Availability in Federal Courts,* 18 Alb. L. Rev. 237, 237 (1954). The writ was therefore developed in the sixteenth century as a means to remedy factual

errors which -- if known at the time of trial -- would have altered the result.

Procedurally, since the common law took the view that a trial record remained with King's Bench, Chancery would issue coram nobis writs to trial judges whose judgments were allegedly infected by factual error, directing them to reexamine those judgments in light of the alleged factual errors. *See generally Jaques v. Caesar*, 2 Wms. Saund. 100, 85 Eng. Rep. 776, 776 n.1 (1668). Significantly, the writ commonly issued when the trial court had been apparently unaware that a party had died prior to the verdict or interlocutory judgment. *See Jaques v. Caesar*, 85 Eng. Rep. at 776 n.1. *See also Pickett's Heirs v. Legerwood*, 32 U.S. (7 Pet.) 144, 148 (1833); *United States v. Plumer*, 27 F. Cas. 561, 573 (C.C.D. Ma. 1859) (No. 16,056).

Once coram nobis was firmly established in English civil procedure, the use of the writ was extended to criminal cases as well. Neither the nature of the writ nor the inquiry changed, but only the context out of which it arose. *See Cornhill's Case,* 1 Lev. 149, s.c. I Sid. 208, 83 Eng. Rep. 342 (1664). As Freedman has noted:

> It was early laid down by the authorities that the writ of error *coram nobis* lies as well in criminal as in civil cases. As part of the common law of England the law still exists in America unless abolished by statute, and our courts will consider the English precedents in determining the extent of the writ, as well as the decisions in America following the common law.

3 Temp. L. Q. at 372 (footnotes omitted).

Thus, as American law developed from English common law, coram nobis was recognized to apply to civil and criminal cases alike. *See Pickett's Heirs v.*

Legerwood, 32 U.S. at 148 (discussing its use in civil proceedings); *Sanders v. State*, 85 Ind. 318, 327 (1882) (noting its availability in the criminal context). Coram nobis has now been supplanted in federal civil cases by Federal Rule of Civil Procedure 60(b). While it lives on as a criminal remedy, the continuing influence of its civil origins cannot be denied. *See generally United States v. Morgan*, 346 U.S. 502, 506-13 (1954).

The death of the party involved in the original proceeding traditionally did not prevent the effective use of a writ of error coram nobis. *See generally Jaques v. Caesar*, 85 Eng. Rep. at 776 n.1, and *Pickett's Heirs v. Legerwood*, 32 U.S. at 148. Indeed, one of the principal forces underlying the development of coram nobis was the need for a decedent's personal representative to correct the record where

a judgment had been entered against the decedent following his or her death. *See Meggot v. Broughton,* Cro. Eliz. 106, 78 Eng. Rep. 364, 364 (1588) (coram nobis held appropriate where, unknown to the court, one of two defendants in an assumpsit action died between the verdict and entry of judgment); *see also Jaques v. Caesar,* 85 Eng. Rep. at 776 n.1 (citing *Meggot* approvingly).

The American courts have also recognized that the coram nobis remedy was not barred by a defendant's death. In *Strode v. The Stafford Justices,* 23 F. Cas. 236 (C.C.D. Va. 1810) (No. 13,537), the plaintiff had obtained a judgment against two defendants. Unknown to the trial court, one defendant had died prior to the entry of judgment, and the plaintiff had not moved to name that defendant's executor as a nominal defendant. Subse-

quently the executor sought a writ of error coram nobis seeking to reverse the judgment. Chief Justice Marshall, sitting as circuit justice, squarely upheld the personal representative's right to use coram nobis in this situation. *Id.* at 236-37.

As *Strode* demonstrates, coram nobis is available to a person acting in a representative capacity. *See also Weaver v. Shaw*, 5 Tex. 286, 287-88 (1849) (discussing an executor's ability to pursue a writ of error coram nobis where a litigant had died prior to entry of judgment).

It is equally true that coram nobis has been available in criminal cases to one acting in a representative capacity. For example, in *Adler v. State*, 35 Ark. 517 (1880), a defendant was convicted of murder despite the fact that he was

apparently insane at the time of trial. After conviction his best friend sought a writ of error coram nobis on the defendant's behalf, based on the defendant's insanity at trial. The Arkansas Supreme Court specifically held that coram nobis was the correct remedy. 35 Ark. at 530.

Similarly, in *Ex parte Toney,* 11 Mo. 661 (1848), a slave was convicted of larceny and sent to prison. The trial court, however, did not know that he was a slave. Since at that time Missouri law did not permit slaves to be imprisoned for such offenses, the slave's owner sought his release through a writ of habeas corpus. The Missouri Supreme Court ruled that habeas corpus was unavailable because no error appeared on the face of the record, and held that coram nobis was the appropriate remedy. 11 Mo. at 663.

More recently, a widow sued the state

prosecutor, police and others, some fifty years after the conviction and execution of her husband. Her petition for writ of error coram nobis was denied by the federal district court in New Jersey, which held that coram nobis is only available from the court that **entered** the judgment of conviction. Since her husband had been convicted in a state court, "[a]ny relief that petitioner [the widow] seeks by way of a writ of error *coram nobis* must be directed at the state level." *Hauptmann v. Wilentz,* 570 F. Supp. 351, 401 (D. N.J. 1983). The court, therefore, recognized that coram nobis **was available** to the widow, acting on her late husband's behalf, in a representative capacity. She had merely brought the coram nobis action in the wrong court.

Thus, the history of coram nobis illustrates that coram nobis actions survive

the death of a criminal defendant, and that such actions may brought may be pursued by the decedent's representative.

CONCLUSION

The duty of this Court is **always** to ensure justice. If this Court were to allow the judicial system to abdicate its duty of independent review in this case, the injustices inflicted upon Petitioner by the government's misconduct in its deliberate suppression and falsification of evidence would stand uncorrected -- and justice would be denied.

The very government that denied Petitioner his constitutional rights during World War II is the same government that now seeks to deny him his right to a full and fair hearing on his Petition for Writ of Error Coram Nobis. This Court cannot allow such a travesty of justice to stand uncorrected.

The controversy is alive, and justiciable. Indeed, the public interest in the fundamental issues raised by this case demands that it be resolved on its merits, in order to prevent future acts of racial discrimination and governmental misconduct in the name of "national security." Petitioner's action must be allowed to continue, through his widow's efforts as a "private attorney general," until this great wrong has been righted, for the benefit of Petitioner, his family, those 110,000 Japanese Americans denied their constitutional rights during the war, and all other Americans.

Respectfully submitted,

PEGGY A. NAGAE
Betts, Patterson & Mines, P.S.
800 Financial Center
1215 Fourth Avenue
Seattle, Washington 98161-1090
(206) 292-9988
Counsel of Record

CLAYTON C. PATRICK
P.O. Box 344
Salem, Oregon 97308
(503) 581-9292

DON S. WILLNER
111 S.W. Front Ave.
Portland, Oregon 97204
(503) 220-0328

FRANK CHUMAN
5306 Angeles Crest Hwy.
La Canada/Flintridge,
California 91011
(818) 952-9019

WM. SCOTT MEISNER
127 North Lawrence
Eugene, Oregon 97401
(503) 344-4465

BERT K. FUKUMOTO
Suite 800
520 S.W. Yamhill
Portland, Oregon 97204
(503) 226-6151

STEPHEN L. GRIFFITH
Suite 2300
900 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 294-9203

Counsel for Petitioner and
True S. Yasui

June 21, 1987

APPENDIX

1. 28 U.S.C. § 1651

Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

---

2. 42 U.S.C. § 1983

[Civil action for deprivation of rights.]

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the juris-

diction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

---

3. 42 U.S.C. § 1988

[Proceedings in vindication of civil rights; attorney's fees.]

The jurisdiction in civil and criminal matters conferred on the district courts by the provision of this Title, and the Title "CIVIL RIGHTS," and the Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication,

shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In an action or proceeding to enforce a provision of sections 1981, 1982, 1983,

1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

---

4. Public Law 77-503, 56 Stat. 173 (1942)

AN ACT

[To provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall enter, remain, leave, or commit any act in any military area or military zone prescribed, under the

authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Approved, March 21, 1942.

---

5. Executive Order No. 9066 (Feb. 19, 1942)

Whereas the successful prosecution of

the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104):

Now, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or

all persons may be excluded, and with respect to which, the right of any person to enter, remain, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military-areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and

authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food,

clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed to modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

THE WHITE HOUSE, February 19, 1942.

---

6. Federal Rule of Criminal Procedure 48(a)

Rule 48. Dismissal.

(a) BY ATTORNEY FOR GOVERNMENT. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

---

7. YASUI v. UNITED STATES, 320 U.S. 115 (1943).

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 871. Argued May 11, 1943. -- Decided June 21, 1943.

Opinion of the Court

MR. CHIEF JUSTICE STONE delivered the

opinion of the Court.

This is a companion case to *Hirabayashi v. United States*, ante, p. 81.

The case comes here on certificate of the Court of Appeals for the Ninth Circuit, certifying to us questions of law upon which it desires instructions for the decision of the case. § 239 of the Judicial Code as amended, 28 U.S.C. § 346. Acting under that section we ordered the entire records to be certified to this Court so that we might proceed to a decision, as if the case had been brought here by appeal.

Appellant, an American-born person of Japanese ancestry, was convicted in the district court of an offense defined by the Act of March 21, 1942. 56 Stat. 173. The indictment charged him with violation, on March 28, 1942, of a curfew order made applicable to Portland, Oregon, by Public

Proclamation No. 3, issued by Lt. General J.L. DeWitt on March 24, 1942. 7 Federal Register 2543. The validity of the curfew was considered in the *Hirabayashi* case, and this case presents the same issues as the conviction on Count 2 of the indictment in that case. From the evidence it appeared that appellant was born in Oregon in 1916 of alien parents; that when he was eight years old he spent a summer in Japan; that he attended the public schools in Oregon, and also for about three years, a Japanese language school; that he later attended the University of Oregon, from which he received A.B. and LL.B. degrees; that he was a member of the bar of Oregon, and a second lieutenant in the Army of the United States, Infantry Reserve; that he had been employed by the Japanese Consulate in Chicago, but had resigned on December 8, 1941, and immediately offered

his services to the military authorities; that he had discussed with an agent of the Federal Bureau of Investigation the advisability of testing the constitutionality of the curfew; and that when he violated the curfew order he requested that he be arrested so that he could test its constitutionality.

The district court ruled that the Act of March 21, 1942, was unconstitutional as applied to American citizens, but held that appellant, by reason of his course of conduct, must be deemed to have renounced his American citizenship. 48 F.Supp. 40. The Government does not undertake to support the conviction on that ground, since no such issue was tendered by the Government, although appellant testified at the trial that he had not renounced his citizenship. Since we hold, as in the *Hirabayashi* case, that the curfew order

was valid as applied to citizens, it follows that appellant's citizenship was not relevant to the issue tendered by the Government and the conviction must be sustained for the reasons stated in the *Hirabayashi* case.

But as the sentence of one year's imprisonment-the maximum permitted by the statute-was imposed after the finding that appellant was not a citizen, and as the Government states that it has not and does not now controvert his citizenship, the case is an appropriate one for resentence in the light of these circumstances. See *Husty v. United States,* 282 U.S. 694, 703. The conviction will be sustained but the judgment will be vacated and the cause remanded to the district court for resentence of appellant, and to afford that court opportunity to strike its findings as to appellant's loss of United

States citizenship.

So ordered.

---

8. January 24, 1984 District Court Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MINORU YASUI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CRIMINAL NO. C 16056
CIVIL NO. 83-151-BE

ORDER

Mr. Yasui was convicted in this court on November 16, 1942, of one count of violation of Public Law 503, 56 Stat. 173. He has filed a Petition of Writ of Error *Coram Nobis* requesting that:

1. the judgment of conviction be vacated;

2. the indictment be dismissed; and

3. the military orders under which he was convicted be declared unconstitutional.

The government has moved the court to grant the same relief, i.e., that Mr. Yasui's conviction be vacated and the indictment dismissed.

The two requests reach the same result. The only difference is that petitioner asks me to make findings of governmental acts of misconduct that deprived him of his Fifth Amendment rights. Petitioner asked for specific findings that:

1. there was no military necessity for the curfew, exclusions and internment of Japanese Americans during World War II;

2. one of the principals involved in these decisions was racist, and the decisions were based on racism;

3. the government knew about and

withheld evidence refuting military necessity; and

4. there was a lack of political leadership in the United States during this time.

I decline to make such findings forty years after the events took place. There is no case nor controversy since both sides are asking for the same relief but for different reasons. The Petitioner would have the court engage in fact finding which would have no legal consequences. Courts should not engage in that kind of activity.

Accordingly, the government's motion is GRANTED. The Petitioner's Petition is DISMISSED. The conviction is vacated.

IT IS SO ORDERED.

DATED this 26th day of January, 1984.

Robert C. Belloni,
United States District Judge

---

9. *Yasui v. United States*, 772 F.2d 1496 (1985)

MINORU YASUI,

Petitioner-Appellant,

vs.

UNITED STATES of America,

Respondent-Appellee.

No. 84-3730.

United States Court of Appeals,
Ninth Circuit.

Argued May 7, 1985.
Submitted May 29, 1985.
Decided Oct. 4, 1985.

Peggy Nagae, Eugene, Or., Clayton C. Patrick, Salem, Or., for petitioner-appellant.

Victor D. Stone, Dept. of Justice, Washington, D.C., for respondent-appellee.

Appeal from the United States District Court for the District of Oregon.

Before KILKENNY, WALLACE, and SNEED, Circuit Judges.

SNEED, Circuit Judge:

Defendant-petitioner Minoru Yasui appeals from an order of the district

court vacating his conviction, dismissing his indictment, and dismissing his petition for a writ of error *coram nobis*. We hold that the appeal is untimely and remand the case to the district court for a determination of whether the time for appeal should be extended because of excusable neglect.

I.

PROCEEDINGS BELOW

On April 22, 1942, Minoru Yasui was indicted in the United States District Court for the District of Oregon under the Act of March 21, 1942, Pub.L. No. 77-503, 56 Stat. 173, for violating a wartime curfew order. The curfew order, Public Proclamation No. 3 of the Western Defense Command, 7 Fed.Reg. 2543 (1942); was issued by General John L. DeWitt on March 24, 1942, and required all persons of Japanese ancestry in certain far western

states to be in their homes between the hours of 8:00 PM and 6:00 AM. On November 16, 1942, Yasui was convicted and sentenced to one year in prison and a $5,000 fine. *United States v. Yasui,* 48 F.Supp. 40 (D.Or.1942). The United States Supreme Court affirmed the conviction, but remanded the case to the district court for resentencing, *Yasui v. United States,* 320 U.S. 115, 63 S.Ct. 1392, 87 L.Ed. 1793 (1943). On remand the sentence was reduced to 15 days imprisonment. *United States v. Yasui,* 51 F.Supp. 234 (D.Or.1943).

On February 1, 1983, Yasui petitioned the district court for a writ of error *coram nobis.* He alleged that the government had suppressed and manipulated evidence in order to create the false impression of a serious wartime threat from Japanese Americans. In his petition

he requested that the district court declare unconstitutional the curfew order that he had been convicted of violating and that the court dismiss his indictment and vacate his conviction based on a new consideration of the evidence.

In response to Yasui's petition, the government moved to dismiss Yasui's indictment, vacate his conviction, and dismiss his petition for writ of error *coram nobis*. Yasui opposed the government's motion. He claimed that he was entitled to a finding that his constitutional rights had been violated, and he argued that a simple dismissal of his indictment and vacation of his conviction without such a finding provided him insufficient relief. On January 26, 1984, the district court granted the govern-

ment's motion.1

On March 2, 1984, Yasui filed in this court a Notice of Appeal of the district court's order. On June 25, 1984, the government moved to dismiss the appeal as untimely.

II.

DISCUSSION

The time allowed for filing a notice of appeal differs between civil and criminal cases. Under Rule 4(a) of the Federal Rules of Appellate Procedure, a notice of appeal in a civil case to which the United States is a party must be filed within 60 days after the date of entry of the judgment or order appealed from.

---

1 On appeal, both parties treat the government's motion as one made pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. Neither the government's motion nor the district court's order, however, referred to that rule.

Under Rule 4(b), a notice of appeal by the defendant in a criminal case must be filed within 10 days. The district court may, however, "[u]pon a showing of excusable neglect," extend the time for filing a notice of appeal in a criminal case for up to an additional 30 days.

Yasui filed his notice of appeal 36 days after the entry of the district court's order granting the government's motion and dismissing his petition. He did not request, and the district court did not grant, an extension of time. Therefore, the timeliness of this appeal depends on whether the 60-day civil time limit (Rule 4(a)) or the 10-day criminal time limit (Rule 4(b)) applies to this appeal.

The question is an open one in this circuit. Neither statute, rule, nor precedent dictates the answer. The

petition for writ of error *coram nobis* is a judicially created, extra-statutory proceeding, to which neither the Federal Rules of Civil Procedure, nor any other set of rules are explicitly applicable. Moreover, the two federal courts of appeals that have reached this issue have arrived at opposite conclusions.

The writ of error *coram nobis* fills a void in the availability of post-conviction remedies in federal criminal cases. A convicted defendant who is in federal custody and claims that his sentence "was imposed in violation of the Constitution or laws of the United States. . .or is otherwise subject to collateral attack" may move to have his sentence vacated, set aside, or corrected under 28 U.S.C. § 2255. But a defendant who has served his sentence and been released from custody has no statutory avenue to relief

from the lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact.

The Supreme Court held, in *United States v. Morgan*, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954), that the common law writ of error *coram nobis* is available to provide such relief.[2] The writ was abolished as a form of relief from civil judgments by Rule 60(b) of the Federal Rules of Civil Procedure, but the court in *Morgan* held that it survives as a post-

---

[2] A writ of error *coram nobis* is also available to correct egregious legal error in prior convictions. *See, e.g., Navarro v. United States*, 449 F2d 113 (9th Cir.1971) (allowing assertion of a self-incrimination defense); *Lewis v. United States*, 314 F.Supp. 851 (D.Alaska 1970) (same); *see also United States v. Morgan*, 346 U.S. 502, 507-08, 74 S.Ct. 247, 250-51, 98 L.Ed. 248 (1954) (noting that the writ has been commonly used in this fashion); *United States v. Wickham*, 474 F.Supp. 113, 116 (C.D.Cal. 1979) (noting that only fundamental legal error can justify issuance of the writ; refusing to issue the writ).

sentence remedy in criminal cases, and that the district courts have power to issue the writ under the All Writs Act, 28 U.S.C. § 1651(a).

In choosing an appropriate time limit for appeal, the only assistance that the *Morgan* opinion provides is contained in a footnote to the opinion. The footnote states that a *coram nobis* proceeding "is of the same general character as one under 28 U.S.C. § 2255." 346 U.S. at 506 n. 4, 74 S.Ct. at 249 n. 4. This observation suggests that one might look to section 2255 and its associated rules for guidance. That section provides that "[a]n appeal may be taken. . . as from a final judgment on application for a writ of habeas corpus," and Rule 11 of the Rules Governing Section 2255 Proceedings specifies that the time for appeal is governed by Rule 4(a), the civil provision

of the Appellate Rules.

The same footnote in *Morgan* states, however, that a *coram nobis* petition "is a step in the criminal case and not, like habeas corpus. . ., the beginning of a separate civil proceeding." 346 U.S. at 505 n. 4, 74 S.Ct. at 249 n. 4. This observation suggests that the criminal time limit should apply.

Precedent, as already mentioned, points in opposite directions. The Second Circuit, in *United States v. Keogh,* 391 F.2d 138, 140 (2d Cir.1968), concluded that the civil time limit should apply to *coram nobis* appeals; the Eighth Circuit, in *United States v. Mills,* 430 F2d 526, 527-28 (8th Cir.1970) *cert. denied,* 400 U.S. 1023, 91 S.Ct. 589, 27 L.Ed.2d 636 (1971), applied the criminal time limit.

We, like the Eighth Circuit, hold that the time for appeal of the dismissal

of the petition in this case is governed by Appellate Rule 4(b), the criminal provision. We reach this conclusion because the petition is, as the Supreme Court stated in *Morgan*, "a step in the criminal case." The purpose of the petition is the setting aside of the petitioner's criminal indictment and conviction. Absent an express congressional command to the contrary, the criminal time limit should therefore apply.

We decline to apply the civil time limit by analogy to cases under 28 U.S.C. § 2255. That section establishes a special, statutory remedy with its own particular procedural requirements and limitations, and explicitly authorizes the taking of appeals as in habeas corpus cases. No such structure surrounds the *coram nobis* writ. The petitioner had no

reason to rely on the time limit applicable to section 2255 proceedings.

We therefore conclude that, the petitioner having failed to file his notice of appeal within the 10 day period applicable in criminal cases, this appeal is untimely.

III.

REMAND TO DISTRICT COURT

Rule 4(b) of the Federal Rules of Appellate Procedure provides that "[u]pon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed thirty days." Such an extension would render the notice of appeal in this case timely.

In *United States v. Stolarz,* 547 F.2d 108, 111-12 (9th Cir.1976), this court

held that under these circumstances, it is appropriate to remand the case to allow the appellant to make a showing of excusable neglect. We therefore remand the case to the district court to allow appellant thirty days in which to request an extension of time to file a notice of appeal, and we retain jurisdiction and postpone ruling on the motion to dismiss the appeal pending the outcome of the proceedings below.

REMANDED.

WALLACE, Circuit Judge, dissenting:

The majority holds that the time limit for criminal appeals should apply to appeals from denial of a writ of error coram nobis. Because I believe this conclusion is based upon an erroneous reading of *United States v. Morgan*, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248

(1954) (Morgan), I respectfully dissent.

The majority pegs its reasoning on footnote 4 of *Morgan*. The majority deems the first sentence of that footnote to be controlling: a coram nobis petition "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding." *Id.* at 505 n. 4, 74 S.Ct. at 249 n. 4.

The Supreme Court in *Morgan* did not intend to impose on coram nobis proceedings all of the rules of criminal procedure. To the contrary, the Court observed in the same footnote that a coram nobis petition "is of the same general character as one under 28 U.S.C. § 2255." *Id.* at 506 n. 4, 74 S.Ct. at 249 n.4. The Court cites the reviser's note to section 2255, *id.*, which points this out vividly: "This section restates, clarifies and simplifies

the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus." 28 U.S.C. § 2255 reviser's note. When the Court in *Morgan* allowed coram nobis petitions beyond those authorized by section 2255, it in no way held that rules appropriate for section 2255 are inappropriate for all other coram nobis proceedings.

Indeed, it seems to me that the Court's limited purpose in drawing the connection between the coram nobis petition and the prior criminal trial was to emphasize the fact that rule 60(b) of the Federal Rules of Civil Procedure, although it abolished coram nobis in purely civil matters, was not intended to affect the common law of coram nobis related to judgments in criminal cases.

See United States v. Balistrieri, 606 F.2d 216, 202-21 (7th Cir.1979), *cert. denied*, 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed2d 271 (1980) (*Balistrieri*); *Neely v. United States*, 546 F.2d 1059, 1066 (3d Cir.1976) (*Neely*); *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir.1968) (*Keogh*); *United States v. Tyler*, 413 F.Supp. 1403, 1404-05 (M.D.Fla.1976) (*Tyler*). I believe that the majority errs when it applies the Court's words without proper reference to their limited purpose, and without giving serious consideration to the Supreme Court's more general direction that coram nobis and section 2255 proceedings should be treated analogously. The Seventh Circuit has accurately interpreted the meaning of *Morgan*'s footnote 4: "[A] coram nobis motion is a step in a criminal proceeding yet is, at the same time, civil in nature and subject to the civil rules

of procedure." *Balistrieri,* 606 F.2d at 221.

The appropriateness of applying the 60-day time limit for appeals to both sections 2255 motions and coram nobis petitions becomes apparent on reflection. The Second Circuit concluded that similar time limits are called for under *Morgan,* observing that "policy considerations supporting prescription of a very short time for appeal in a criminal case are notably absent in *coram nobis.*" *Keogh,* 391 F2d at 140. For purposes of time limits for appeal, I see no reason to distinguish between common law coram nobis, section 2255 coram nobis, and even a petition for writ of habeas corpus. *Cf. United States v. Taylor,* 648 F.2d 565, 571 n. 21, 573 & n. 25 (9th Cir.) (coram nobis petitions should be treated like section 2255 claims and habeas corpus petitions

for purposes of analyzing issues and determining the necessity of a hearing), *cert. denied,* 454 U.S. 866, 102 S.Ct. 329, 70 L.Ed.2d 168 (1981); *Neely,* 546 F2d at 1066 (common law coram nobis action for relief from criminal judgments need not be characterized as criminal in nature); Rules Governing Section 2255 Proceedings for the United States District Courts Rule 1 advisory committee note ("the fact that Congress has characterized the [section 2255] motion as a further step in the criminal proceeding does *not* mean that proceedings upon such a motion are of necessity governed by the legal principles which are applicable at a criminal trial").

To obtain a writ pursuant to either section 2255 or a habeas corpus petition the petitioner still must be "in custody." *See* 28 U.S.C. §§ 2255, 2241(c)-(d); *see*

also Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968) (applying "in custody" requirement for habeas corpus). The common law writ of coram nobis is so far removed from the original trial and the time constraints of the original trial proceedings that it dispenses even with the "in custody" requirement. *Cf. Tyler,* 413 F.Supp. at 1404-05 (that petitioner no longer is in custody reflects civil nature of coram nobis proceeding). Yet now, over 40 years after completion of trial, and over 40 years after Yasui completed his sentence, the majority concludes that the tight time limits of criminal procedure must be applied-even as it admits that those limits are not "explicitly applicable." Maj.op. at 1498. In my judgment, the majority adopts a conclusion which is supported neither by the weight of authority in other circuits, nor by

sound policy, nor by *Morgan* itself.

---

10. Oral ruling of District Court, May 5, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MINORU YASUI,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

CR No. C-16056
CV No. 83-151-BE
[9th Cir.] No. 84-3730

Portland, Oregon
May 5, 1986
3:00 o'clock, p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT C. BELLONI

APPEARANCES:

For the Plaintiff: Peggy A. Nagae, Donald S. Willner, Clayton Patrick

For the Defendant: Victor D. Stone, Herbert C. Sundby

Court Reporter: Jerry C. Harris

AT PAGE 35:

THE COURT: Miss Nagae, it would have been a lot easier to simply have filed your notice of appeal within ten days rather than reading all the cases to find out how many days you had to file. But then I don't think you will make that mistake again.

I find that excusable neglect has been shown and petitioner is granted a 30-day extension of time.

Please remember this now gives you only a very few days in which to file.

MS. NAGAE: Thank you, Your Honor.

[END OF TRANSCRIPT]

---

11. May 6, 1986 District Court Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MINORU YASUI,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. Civ 83-151 RCB
No. Crim C16056
No. 84-3730 (9CA)

ORDER

Pursuant to the remand of the Ninth Circuit Court of Appeals, the Petitioner's Motion to Extend Time for Appeal was briefed by both parties, and came on for hearing on May 5, 1986.

The Court having reviewed the Memoranda and Affidavits filed in support of, and in opposition to the Motion, and having heard oral argument, hereby finds that the Petitioner's failure to file the

Notice of Appeal within the ten day time period provided by FRAP 4(b) was due to excusable neglect.

The Petitioner's Motion to Extend Time for Appeal is therefore GRANTED.

IT IS SO ORDERED.

Dated this 6th day of May, 1986.

Robert C. Belloni,
United States District Judge

---

12. March 23, 1987 Order of the Ninth Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINORU YASUI,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 84-3730
DC# CV 83-151-RCB
Oregon (Portland)

and:

UNITED STATES OF AMERICA

Plaintiff-Appellant,

vs.

MINORU YASUI,

Defendant-Appellee.

No. 86-3116
DC# CV 83-151-RCB
Oregon (Portland)

ORDER

Before: GOODWIN, SCHROEDER and POOLE, Circuit Judges

Yasui's motion for substitution of party is denied.

The government's motion to dismiss these appeals as moot is granted.

CR CAL 3/16/87